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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEROY LOGAN, RAYMOND LASHLEY, FRANCES HOLDING, HAZEL HARPER, ARITA JUMP, ANTHONY DANIELS, and ROSA JAKE, *Petitioners*,

v.

CECIL D. ANDRUS, Secretary of the Interior; BENJAMIN REIFEL, Commissioner of Indian Affairs; OSAGE TRIBAL COUNCIL, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the plenary power of Congress over Indian affairs may sustain the Osage Allotment Act, 34 Stat. 539 (1906), which is otherwise unconstitutional under the "one-man, one-vote" rule of Reynold v. Sims, 377 U.S. 533 (1964)?

2. Whether the court below was obliged to construe the Osage Allotment Act, where fairly possible, to avoid constitutional difficulties and to adopt the interpretation which will not endanger the statute's constitutional validity?

3. Whether a voter who is subject to a disparate voting scheme based on property interests suffers injury sufficient to have standing to challenge that voting scheme?

4. Whether a party in a declaratory judgment action may challenge the judgment on the basis that the judgment leads to an unconstitutional result?

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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEROY LOGAN, et al.
Petitioners,

v.

CECIL D. ANDRUS, Secretary of the Interior, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, individual Osage Indians, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on February 3, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is

unreported at this date, but is reproduced in the Appendices beginning at A-45. The opinion of the District Court is reported at 457 F.Supp. 1318 and is reproduced beginning at A-1 herein.

JURISDICTION

The opinion of the Court of Appeals was entered on February 3, 1981, and this petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part:

> "No person shall ... be deprived of life liberty, or property, without due process of law ..."

Section 9 of the Osage Allotment Act, 34 Stat. 539, as amended by the Act of

October 21, 1978, 92 Stat. 1660, reads as follows:

> "There shall be a quandrennial election of the officers of the Osage Tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage Tribal Council shall be elected to succeed the officers elected in the year 1974 at a general election to be held in the town of Pawhuska, Oklahoma, on the first Monday in June 1978 and on the first Monday in June of each fourth year thereafter, in a manner to be prescribed by the Secretary of the Interior, and said officers shall be elected for a period of four years commencing on the first day of July following the election. In case of a vacancy in the office of principal chief or other officer by death, resignation, or otherwise, the vacancy shall be filled in a manner to be prescribed by the Osage Tribal Council. In the event of a common disaster and a quorum of five of the Osage Tribal Council does not survive, the Secretary shall appoint a principal chief and/or the number of councilmen necessary to complete a total of eight, to serve until the next quadrennial election. The Secretary is hereby authorized to remove from the council any member or members for good cause, to be by him determined, after the party involved has had due notice and opportunity to appear and defend himself. The tribal government so

> constituted shall continue in full force and effect until January 1, 1984, and thereafter until otherwise provided by Act of Congress".

The Osage Allotment Act, supra, is reproduced in its entirety in the Appendices beginning on page A-54.

STATEMENT OF THE CASE

A. Introduction

The question of the governmental powers of the Osage Tribe of Indians in Oklahoma is unique among Indian tribes and has for many years been a source of confusion and hardship for tribal members, and agencies that must deal with the tribe. Unlike other Indian tribes, the Osage Tribe is not organized under the Indian Reorganization Act, 25 U.S.C. § 461 et seq., or the Oklahoma Indian Welfare Act, 25 U.S.C. § 508, and does not function under a constitution or bylaws. Instead, its governmental activities are conducted by an entity created by Congress in the Osage

Allotment Act of 1906, 34 Stat. 539, and known as the Osage Tribal Council.

Because of its unique mineral wealth in natural oil and gas, the Osage Tribe has received sui generis treatment from Congress. A brief review of this treatment is useful as a backdrop.

In 1872 Congress confirmed to the Osage Tribe a reservation in north central Indian territory.[1] In 1896 an oil and gas lease of the reservation was made, followed by substantial discoveries in 1904 and 1905.[2] The Osage Tribe accumulated a large tribal trust fund in the Treasury from the oil and gas leases, grazing leases, sales of townsite lots, permit taxes, and sale of an earlier tribal reservation in Kansas.[3]

1/ Act of June 5, 1872, ch. 310, 17 Stat. 228. See Appropriations Act of July 15, 1870, ch. 296, § 12, 16 Stat. 335, 362.

2/ See Appropriations Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1061.

3/ See McCurdy v. United States, 246 U.S. 263, 265 (1918); Osage Agency, Bureau of Indian Affairs, The Osage People and Their Trust Property, ix (1953).

Tribal wealth made the Osages targets of various forms of fraud and overreaching.[4]

In 1906 Congress passed the Osage Allotment Act, supra, a complex statute attempting to individualize much of the Osage tribal property and to provide some protection for tribal members.[5] A tribal roll of the members entitled to share in property distributions was authorized.[6] The tribal mineral estate was severed and retained in tribal trust ownership,[7] but

4/ Osage Agency Rep., supra note 3, at v. Congress passed laws to try to combat the excesses of traders among the Osages. E.g., Appropriations Act of Mar. 3, 1901, ch. 832, 31 Stat. 1058, 1065-66.

5/ Osage Allotment Act, 34 Stat. 539. (App. pp. A-54, et seq.)

6/ Osage Agency, Bureau of Indian Affairs, The Osage People and Their Trust Property, ix (1953); Osage Allotment Act, supra, § 1, 34 Stat. at 539.

7/ Osage Allotment Act, supra, § 3, 34 Stat. at 543. This section retained the mineral estate in tribal trust for 25 years. The Act provided for remainders to allottees in severalty thereafter "unless otherwise provided for by Act of Congress." §§ 2, para. 5, 34 Stat. at 542, 544. (Footnote continued on next page).

most of the mineral income was to be paid per capita to the persons on the membership roll or their heirs.[8] Most tribal income from other sources was to be distributed in the same way.[9] The land other than the mineral estate, with minor exceptions, was allotted in severalty to tribal members.[10]

The most distinctive feature of the Osage Allotment Act is the use of the 1906 roll as the permanent basis for per capita distributions of tribal income and property. Osage Indians born since the 1906 roll

(Footnote 7 continued) Congress has repeatedly extended the tribal trust. Act of Mar. 3, 1921, ch. 120, § 1, 41 Stat. 1249 (to 1946); Act of Mar. 2, 1929, ch. 493, § 1, 45 Stat. 1478 (to 1958); Act of June 24, 1938, ch. 645, § 3, 52 Stat. 1034, 1035 (to 1983). The trust period was made indefinite by the Act of October 6, 1964, 78 Stat. 1008, and was extended "in perpetuity" by the Act of October 21, 1978, 92 Stat. 1660.

8/ Osage Allotment Act, supra, § 4, 34 Stat. at 544.

9/ Id.

10/ Id., § 2, 34 Stat. at 540.

closed[11] do not acquire the usual rights of persons born into an Indian tribe to share in distributions of tribal property.[12] Rather, the Act converted the right to receive tribal property distributions into a restricted tenancy in common for the persons on the 1906 roll. This right, which has come to be called an Osage "headright," passes to the heirs, devisees, and assigns of owners.

Even the right to vote in Osage tribal elections depends on headright ownership.[13] Most persons of Osage Indian ancestry own no headrights and thus receive no tribal income and cannot vote in tribal elections.[14] Some persons own more than one

11/ The roll was intended to include all Osage Indians born before July 1, 1907. Id., § 1, 34 Stat. at 539.

12/ See H.R. Rep. No. 963, 92d Cong., 2d Sess. 9 (1972).

13/ 25 C.F.R. pt. 73 (1980).

14/ See S.Rep. No. 95-1157, 95th Cong., 2d Sess. 7 (1978). According to this report

(Footnote continued on next page).

headright, or own fractional shares of headrights, and some headrights are owned by non-Osages.[15]

The Osage Tribal Council was created by Section 9 of the Osage Allotment Act, 34 Stat. at 545, and is empowered to perform certain enumerated functions by the Act principally in the area of management

(Footnote 14 continued) in 1977:

> the Osage Tribe consisted of 9,205 persons of Osage blood who are carried on the Agency census records. Of these, 9,205 individuals, an estimated 7,022 have no interest in the tribal mineral estate (known as a headright interest) and, under departmental regulations, have no vote in tribal elections[s] and no right to hold executive office, in the Osage Tribal Council.

Id. For many years after 1906, the term "members of the Osage Tribe" meant only persons on the 1906 roll. After passage of the 1929 Act the term came to include unenrolled Osages who succeeded to trust property. § 5, 34 Stat. at 1481. As the quotation above reflects, the term is now used to include all persons of Osage ancestry on BIA records.

15/ See H.R. Rep. No. 963, 92d Cong., 2d Sess. 9 (1972) (shares range "from .00065 of a share to multiple shares").

of the Tribe's mineral estate (Section 3). (App. pp. A-27, A-28).

It is the nature of the powers of the Osage Tribal Council which is at issue in this declaratory judgment action. In defining the extent of power of the Osage Tribal Council, the Secretary of the Interior has taken the position in this case that the Council was established as a general government. This position was upheld by the court below. (App. p. A-50). However, for a long period of years the Secretary took the opposite view in representations before Congress, characterizing the Council as "a board of directors of a corporation" that is "primarily responsible for management of the tribal mineral estate," and that:

> "In the absence of a tribal governing body that more fully represents all individuals of Osage Indian blood and that is less restricted in its authorities the Osage Tribal Council has been called upon to assume responsibi-

> lities not foreseen at the time of passage of the 1906 Act which created the council in its present form."16

The Secretary has also reported to Congress that:

> "The present tribal council ... is actively seeking to expand its functions in areas other than mineral trust interests. These areas are education, housing, employment and economic development. However, under the Statute [Osage Allotment Act] the tribal council's powers are limited to actions taken within the purview of the mineral trust estate.
>
> The tribal council now finds itself in a legal quandry since their powers are limited to the mineral trust estate but the needs of the Osage Tribe certainly extend beyond mere management of that estate."17

Congress has not only accepted the above

16/ H.R. Rep. No. 963, 92nd Cong., 2d Sess. 7-8 (1972).

17/ HEARINGS before the SENATE SUBCOMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 92nd Cong., 2d Sess. 102-103 (1972).

interpretations[18] but has expressed concerns about the unrepresentative and limited nature of the Tribal Council.[19]

In the Act of October 21, 1978, 92 Stat. 1660, Congress amended Section 9 of the Osage Allotment Act to extend the life of the Osage Tribal Council as follows:

> "The tribal government so constituted shall continue in full force and effect until January 1, 1984 and thereafter until otherwise provided by Act of Congress."

The court below gave great weight to the use of the term "said tribal government" in a prior act relating to the Osages (45 Stat. 1478), holding that the term is "significant

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18/ For example, in the Act of October 27, 1972, 86 Stat. 1295, which set aside 1 million dollars for tribal purposes, Congress directed the Secretary, rather than the tribal council, to administer these funds.

19/ In 71 Stat. 471 (1957)(extending the life of the Tribal Council until 1984) the Committee on Interior and Insular Affairs recommended passage, but requested the Bureau of Indian Affairs to review and report upon a proposal to reorganize and enlarge the present form of Osage government. H.R. Rep. No. 965, 85th Cong., 1st Sess. 2 (1957).

and resolves the question of the Council's general authority ..." (App., p. A-50). However, in the above act extending the life of the Tribal Council, the legislative history makes it clear that Congress was aware of the unrepresentative nature of the Council and the issues of this litigation, but chose not to address these issues:

> "In the last few years, a group of persons of Osage blood have filed suit against the Department of the Interior alleging that the tribal council has statutory authority only for management of the Osage mineral estate and not for general government of the Osage tribe. Section 1 of H.R. 11894 would extend for the exisistence of the tribal council indefinitely and provides for the filling of various offices in the event of a common disaster. The committee does not intend by enactment of this section to affect in any way the question involved in the lawsuit noted above (Logan et al. v. Andrus et al.), Civ. No. 77-165-C, N.D. Oklahoma)."

H.R. Rep. No. 95-1459, 95th Cong., 2d Sess. 3 (1978). Cf. S. Rep. No. 95-1157, 95th Cong., 2d Sess. 6 (1978).

B. Course of Litigation

This is a declaratory judgment action involving the construction of the Osage Allotment Act, supra, as amended, to define the extent of authority conferred by Congress upon the Osage Tribal Council. Petitioners seek a review of the decision below because the Court of Appeals erroneously construed the Osage Allotment Act in a manner that has lead to an unconstitutional result in violation of applicable canons of statutory construction of this Court.

This action was brought by certain Osage Indians (Petitioners here) owning one or more "headright" shares in the Osage tribal trust mineral estate against the Secretary of the Interior (hereinafter "the Secretary") and the Commissioner of Indian Affairs seeking a declaratory judgment regarding the nature and extent of congressional authority conferred upon these federal officials to approve actions of

the Osage Tribal Council. The complaint sought a declaration that the powers of the Osage Tribal Council are limited to those matters specified by the Osage Allotment Act, supra, 34 Stat. 539, as amended; and that the Secretary and the Commissioner are not empowered to approve Tribal Council activity unrelated to 34 Stat. 539, as amended.[20] The federal defendants maintained that the Osage Tribal Council is a general government for the Osage Indian Tribe and may exercise powers beyond those enumerated in the Osage Allotment Act.

The suit was originally filed in the United States District Court for the District of Columbia and subsequently transferred, sua sponte, to the Northern District of Oklahoma. Following the transfer of the action, the district court ordered that the Osage Tribal Council be added as a

20/ District Court jurisdiction was invoked under 28 U.S.C. §§ 1331 and 2201.

necessary party defendant under Rule 19(a)(2), Fed. R. Civ. P.

The district court decided the case on plaintiffs' motion for summary judgment and upon the parties' stipulation that there existed no genuine issue as to any material fact. (App., p. A-4). It entered a judgment declaring that the Osage Allotment Act amended and expanded the powers of a pre-existing Osage tribal government created under the Constitution of the Osage Nation of 1881. (App., pp. A-28 - A-30). In arriving at its holding, the district court found that the 1881 government was still functioning as a matter of law at the time of the passage of the Act in 1906, because the Secretary's purported abolishment of that government in 1900 was of no legal effect. (App., pp. A-17 - A-18). Based upon that analysis, the district court concluded, "that Congress intended only to expand the authority of the Tribal Council

and to modify the procedure for the election of tribal officers, and neither to abolish the officers already in existence nor to create entirely new ones. [Footnotes omitted]." (Id., pp. A-28, A-29).

Because the district court's holding created a prima facie unconstitutional voting rights situation for the plaintiffs and added more confusion for the parties in interpreting their rights and the extent of the legal powers of the Osage Tribal Council vis-a-vis the long defunct 1881 tribal government, the plaintiff-shareholders filed a motion to vacate judgment. The district court denied said motion holding that the issue of the constitutionality of the Osage Allotment Act was not before the court. (Id., p. A-43). The denial of the motion to vacate was appealed by the plaintiff shareholders.

The Court of Appeals affirmed the district court's holding that the Osage Tribal

Council was invested with general governmental powers (App., p. A-53), but on entirely different grounds. The court held that the Council derived general powers solely from the language of the Osage Allotment Act, as amended, (App., pp. A-52, A-53), and not because of any authority from the 1881 Constitution (id.). The court reversed the district court's holding as to the validity of that Constitution to clarify that its status stands as an issue not adjudicated in this action. (Id. at A-52).

As to the constitutional problem created by its construction of the Osage Allotment Act, the Court of Appeals noted that the issue was "important" but ruled that it was merely an "academic question" because, since the shareholders were entitled to vote, they did not have standing to raise the issue. (App., p. 51).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT FIRST IMPRESSION QUESTIONS OF FEDERAL INDIAN LAW AS TO THE LIMITS OF CONGRESS' PLENARY POWER OVER INDIAN AFFAIRS WHEN IT LEGISLATES TO ESTABLISH GENERAL GOVERNMENTS FOR INDIAN TRIBES

The court below ruled that Congress created a system of general government in the Osage Allotment Act and imposed it upon the Osage Tribe. This interpretation was made in spite of the fact that voting and office holding in this "government" are based on property interests which result in the exclusion of 7,022 of the 9,205 persons of Osage ancestry,[21] and a highly disparate voting system for the minority of eligible Osage Indians.[22]

The lower court's interpretation of the Osage Allotment Act is contrary to the national policy of Indian Self-Determination, (see Bryan v. Itasca County, 426 U.S. 373 (1976)) and raises constitutional

21/ See note 14, supra.
22/ See note 15, supra.

questions of first impression regarding the constitutional limitations on the plenary power of Congress over Indian affairs.

This Court has never ruled upon the question of whether the plenary power of Congress over Indian affairs may sustain the creation of a general tribal government which is otherwise unconstitutional under the "one-man, one-vote" rule of Reynold v. Sims, 377 U.S. 533 (1964). Although this Court has recognized that the plenary power of Congress is not absolute, United States v. Alcea Band of Tillemooks, 329 U.S. 40, 54 (1946)(plurality opinion), and that Indian legislation may be scrutinized to determine whether it violates the equal protection component of the Fifth Amendment, Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974), in no case has the need to review the plenary power of Congress been so compelling. If the opinion

below is left to stand, the Osage Tribe and its members will be the only tribe in the nation with a government created and imposed by Congress with a patently unconstitutional franchise. Petitioners believe a general government either was not intended by Congress and the lower court's holding is erroneous, or that the plenary power of Congress does not extend as far as the lower court would have us believe. (App., p. A-50). Congress' power over Indian affairs has constitutional limits and a review by this Court is necessary to insure that those limits are respected. Otherwise, the political rights of tribal Indians and the self-government rights of the tribes themselves are subject to the whims of Congress.

II. THE COURT OF APPEALS' OPINION CONFLICTS WITH THE PRINCIPLES OF REYNOLD V. SIMS, ERRONEOUSLY PLACES AN ACT OF CONGRESS IN CONSTITUTIONAL JEOPARDY, AND VIOLATES BASIC CANONS OF STATUTORY CONSTRUCTION OF THIS COURT.

By construing the Osage Allotment Act to confer general governmental powers upon the Osage Tribal Council, notwithstanding the fact that, "at present many persons who assert they are Osages do not have headrights and thus cannot vote for the Council" (App., p. A-51), the court below placed the Act on a collision course with the "one-man, one-vote" rule of Reynold v. Sims, supra, 377 U.S. 533 (1964).

In Reynold v. Sims, supra, this Court held that a voting apportionment scheme which resulted in 43 percent of the population electing a majority of Alabama's state legislators violated the Equal Protection Clause of the Fourteenth Amendment. The Court held that all citizens have an inalienable right to full and effective partici-

pation in the political process, and that such right is unconstitutionally impaired where an individual's right to vote is substantially diluted when compared to the votes of other citizens.

If the Osage Tribal Council is deemed to be a general government, rather than a mineral estate management board, then the voting rights of petitioners are unconstitutionally impaired under Reynold v. Sims, supra. See also Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo., 397 U.S. 50 (1970). So construed, the Osage Allotment Act, which created the voting scheme, is placed in serious constitutional jeopardy.

Section 9 of the Osage Allotment Act, as amended, states that elections for the Tribal Council shall be conducted "in the manner prescribed by the Commissioner of Indian Affairs." As a result, only headright shareholders of Osage blood are

entitled to vote and hold office.[23] Votes are apportioned according to headright ownership and "each ballot shall have exactly the same value as the voter's headright interest shown on the last quarterly annuity roll."[24]

As noted by the district court, petitioners own one or more headright shares in the Osage mineral estate. (App., pp. A-1 - A-2). As such, under the voting scheme these parties are subjected to a grossly disparate voting scheme in terms of the value accorded each vote cast. For example, as petitioners' counsel pointed out at oral argument in the court below, petitioner Logan's vote counts three times more weight than petitioner Lasley's because of the difference between the amount of headright shares owned by each party.

Since headright shares pass to heirs,

23/ See, 25 C.F.R. Part 73 (1980).
24/ 25 C.F.R. § 73.21 (1980).

devisees, and assigns of owners, shareholders may own more than one headright or a fraction of a share. Ownership of shares and voting weight thus ranges "from .00065 of a share to multiple shares."[25] Additionally, most persons of Osage ancestry own no headright shares and cannot vote for the Tribal Council or hold office.[26]

A voting scheme of this nature under the Osage Allotment Act cannot possibly be upheld under the Fifth Amendment if the Act is construed to confer general governmental power upon the Osage Tribal Council. In Gray v. Sanders, 372 U.S. 368, 379 (1963), this Court struck down a less drastistic weighted voting system, stating:

> "If a State in a statewide election weighted the male vote or the white vote more heavily than the Negro vote, none could successfully contend that discrimination was allowable. (Citation omitted.) How then can one person

25/ See note 15, supra.

26/ See note 14, supra.

> be given twice or 10 times the voting power of another person merely because he lives in a rural area or because he lives in the smallest rural area?"

The Osage voting scheme can only be deemed rational if the Act is construed to grant the limited powers enumerated in the Act, which confers power only to manage the tribe's mineral estate. This construction is amply supported by the legislative history behind the Act and other laws pertaining to the Osage tribe,[27] and the failure of the court below to adopt this construction and avoid constitutional problems renders the decision below prima facie erroneous. United States v. Thompson,

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27/ Congress has always tied the life of the Osage Tribal Council to the existence of the Osage mineral estate (71 Stat. 471), based upon legislative history which plainly indicates that the function of the Council is limited to the management of the mineral estate. H.R. Rep. No. 965, 85th Cong., 1st Sess. 1 (1957); H.R. Rep. No. 1901, 70th Cong., 1st Sess. 6 (1928); S. Rep. No. 4210, 59th Cong., 1st Sess. 2 (1906). See also notes 16-19, supra.

452 F.2d 1333, 1337 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1972).

When the court below construed the Osage Allotment Act in such a manner so as to hold that Congress intended the Osage Tribal Council to be a general government, the court violated a cardinal rule of statutory construction of this Court. It is an elementary and familiar principle of statutory construction that the courts are obliged to construe a statute, where possible, to avoid constitutional difficulties. Congress is presumed to enact laws in accordance with the Constitution, and where more than one interpretation of a statute is reasonably possible, courts adopt the interpretation which will not endanger or question the statute's constitutional validity. In United States v. Harris, 347 U.S. 612, 619, n.6 (1954), this Court stated:

> "... this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality."

See also United States v. Rumely, 345 U.S. 41, 45 (1953); Alabama State Federation of Labor v. McCoy, 325 U.S. 450, 470 (1945); Porter v. Investors Syndicate, 286 U.S. 461, 470 (1932). This canon was restated with force in Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974):

> "... when one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if the language ... and arguably the legislative history somewhat point more strongly in another way." [Emphasis added]

This canon applies where a contrary interpretation would "even ... come so near to doing so as to raise a serious question of constitutional law." Anniston Mfg. Co. v. Davis, 301 U.S. 337, 351-352 (1937).

Because the Court of Appeals ignored the above cardinal rule and unnecessarily created serious constitutional problems

concerning the Osage Allotment Act, its holding is erroneous.

III. PETITIONERS HAVE STANDING TO CHALLENGE THE DECLARATORY JUDGMENT RENDERED BELOW ON THE BASIS THAT IT ERRONEOUSLY PLACES AN ACT OF CONGRESS IN CONSTITUTIONAL JEOPARDY.

The Court of Appeals refused to consider the constitutional implications of its holding and whether the above canon of statutory construction requires a different result. Instead, the court sidestepped this central issue by holding that it is "academic" because petitioners do not have standing to raise it. (App., p. A-51).[28]

28/ The court below also intimated that the constitutional issue was improperly before the court because it was not addressed by the trial court until after judgment when it was raised in petitioners' motion to vacate judgment. (App. p. A-51). The court ignored the fact that the voting regulations were cited in the complaint and in the plaintiffs' memorandum in support of summary judgment. The unrepresentative nature of the Osage Tribal Council was one of the principle grounds relied upon in support of plaintiffs' claim that the powers of the Tribal Council are limited, as the voting scheme cannot otherwise be upheld as (Footnote continued on next page).

The court's holding that petitioner shareholders lack standing is clearly erroneous for two reasons.

First, as discussed above, petitioners, and each of them, are subject to a widely disparate voting scheme for what the court below held to be a general governing entity. As such, petitioners' rights to vote are substantially diluted and unconstitutionally impaired. Reynold v. Sims, supra, 377 U.S. 533, 568 (1964). In this circumstance petitioners suffer voting disadvantages sufficient to have standing. Baker v. Carr, 369 U.S. 186, 206-208 (1962).

Second, as parties to a declaratory judgment action that seeks an interpreta-

(Footnote 28 continued) rational. As such, the issue and applicable canons of statutory construction were implicitly before the trial court as noted in its opinion at page A-29, n.25.

Moreover, the constitutional issue was before the Court of Appeals when it rendered its declaratory judgment on grounds entirely different from those of the trial court.

tion of a statute, petitioners may invoke applicable canons of statutory construction to challenge an erroneous interpretation of the statute.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

Leroy LOGAN, Raymond Lasley, Frances Holding, Hazel Harper, Arita Jump, Anthony Daniels, and Rosa L. Jake, Plaintiffs,

v.

Cecil D. ANDRUS, Secretary of the Interior, Benjamin Reifel, Commissioner of Indian Affairs, Bureau of Indian Affairs, Defendants,

Osage Tribal Council, Party Defendant.

No. 77-C-363-C.

United States District Court, N. D. Oklahoma.

Oct. 5, 1978.

ORDER

The plaintiffs in this action are seven (7) enrolled members of the Osage Tribe of Indians,[1] each of whom resides in the State of Oklahoma and owns one or more

1/ The defendants deny that the plaintiffs are enrolled members of the Osage Tribe; however, the Court views that dispute as immaterial either to the existence of subject matter jurisdiction or to the issues raised in plaintiffs' motion for summary judgment.

Osage "headrights".[2] Originally named as defendants were the Secretary of the Interior and the Commissioner of Indian Affairs (hereinafter "federal defendants"). This action was filed in the United States District Court for the District of Columbia and was subsequently transferred to this Court pursuant to 28 U.S.C. § 1406. Following the transfer, this Court, on the motion of the federal defendants, Ordered that the Osage Tribal Council (Council) be added as a necessary party defendant under Rule 19(a)(2) of the Federal Rules of Civil Procedure. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331

2/ A "headright" is the right to receive trust funds and mineral interests at the end of the trust period, as hereinafter described, and during that period to participate in the distribution of bonuses and royalties arising from the mineral estate and the interest on the trust funds. United States v. Mason, 412 U.S. 391, 393, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973); Globe Indemnity Co. v. Bruce, 81 F.2d 143, 148-149 (10th Cir. 1935).

and 2201.[3] The plaintiffs allege that the Council was created by the Act of June 28, 1906, 34 Stat. 539 (hereinafter "Osage Allotment Act"), solely to dispose of certain tribal assets and to manage the mineral resources of the Tribe, and was not intended to be a general governing body. They contend that the Osage Tribe has neither a general tribal government nor a constitution or bylaws. Plaintiffs allege that the federal defendants have acted beyond the scope of their authority in approving actions taken by the Council beyond those expressly enumerated in the Osage Allotment Act, as amended. The plaintiffs further allege that the federal defendants routinely approve disbursements of tribal trust funds for activities unrelated to the management of the Osage mineral estate and that such

3/ The Court has previously overruled the defendants' motion to dismiss, which was based in part upon an alleged lack of subject matter jurisdiction.

actions constitute violations of fiduciary standards and the Fifth Amendment to the United States Constitution. The plaintiffs request a declaratory judgment in accordance with their allegations. The defendants take the position that the Council possesses general powers of tribal government and is not limited to the activities prescribed by the Osage Allotment Act. They further contend that any expenditures of trust funds have been necessary and proper and have benefitted all members of the Tribe, including the plaintiffs. Now before the Court for consideration is the motion of the plaintiffs for summary judgment. The parties have filed extensive briefs and presented oral arguments in support of their positions and have stipulated that there is no genuine issue as to any material fact which would preclude the Court from ruling on the merits of the plaintiffs' motion.

[1-5] Indian tribes have always been

considered as distinct, independent, political communities. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1833). As such, they are "... qualified to exercise powers of self-government, not by vitue of any delegation of powers from the federal government, but rather by reason of their original tribal sovereignty." F. Cohen, Handbook of Federal Indian Law, p. 122 (hereinafter referred to as "Cohen"). See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); United States v. Wheeler, 435 U.S. 313, 55 L.Ed.2d 303 (1978); United States v. Kogama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); The Kansas Indians, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667 (1866). "Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the

Indians' choosing [and] to define conditions of tribal membership ..." Cohen at 122.[4] Treaties with the Indian tribes uniformly contained provisions in which the Indians acknowledged that they were under the protection of the United States and of no other sovereign whatsoever.[5] The recogni-

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4/ Self-government also includes the power "... to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice." Cohen at 122.

5/ For example, the Osage treaty of November 10, 1808, 7 Stat. 107, provides as follows in Article 10, 7 Stat. at 109:

> "The United States receive the Great and Little Osage nations into their friendship and under their protection; and the said nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell or in any manner transfer their lands to any foreign power, or to citizens of the United States or inhabitants of Louisiana, unless duly authorized by the President of the United States to make the said purchase or accept the said cession on behalf of the government."

tion of that dependent status did not deprive the tribes of sovereign powers which they otherwise possessed, even in the absence of a specific recognition by the United States of the continuance of the right of self-government.[6] United States Wheeler, supra; The Kansas Indians, supra; Worcester v. Georgia, supra. However,

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' [citation omitted]. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised."

United States v. Wheeler, supra, 435 U.S.

6/ All of the treaties between the United States and the Osage Indians are silent regarding the power of the tribe to govern itself. See Treaty of November 10, 1808, 7 Stat. 107; Treaty of September 12, 1815, 7 Stat. 133; Treaty of September 25, 1818, 7 Stat. 183; Treaty of August 31, 1822, 7 Stat. 222; Treaty of June 2, 1825, 7 Stat. 240; Treaty of August 10, 1825, 7 Stat. 268; Treaty of August 24, 1835, 7 Stat. 474; Treaty of May 26, 1837, 7 Stat. 533; Treaty of January 11, 1839, 7 Stat. 576; Treaty of September 29, 1865, 14 Stat. 687.

at 323, 98 S.Ct. at 1086. All rights of sovereignty exercised by Indian tribes are subject to the supreme legislative authority of the United States. Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896). Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess, Santa Clara Pueblo v. Martinez, supra, including the power to determine their own form of government, United States v. Wheeler, supra; Gritts v. Fisher, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912), and their power to define the members of the tribe, Gritts v. Fisher, supra; Wallace v. Adams, 204 U.S. 415, 27 S.Ct. 363, 51 L.Ed. 547 (1907); 25 U.S.C. § 184. In sum, Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or by act of Congress.[7] United States v. Wheeler, supra;

(Footnote 7 on next page.)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978); Roff v. Burney, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

[6] As a matter of necessity, Congress has delegated much of its power over the Indians to administrative officials. Cohen at 100.

7/ Cohen summarizes the nature of Indian sovereignty at p. 123 of his treatise as follows:

> "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constitute organs of government."

> "Historically, the Secretary of the Interior has been the delegated arm of the Federal government to act as the guardian of the Indian ward; to administer the affairs of its Indians, and to that end has been granted wide discretionary powers in the enforcement of the declared Congressional policy." 8

Board of Commissioners of Pawnee County,

8/ The Act of March 3, 1849, 9 Stat. 395, which created the Department of the Interior, provided in Section 5 "[t]hat the Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department, in relation to all acts of the Commissioner of Indian Affairs." The Act of July 27, 1868, 15 Stat. 228, transferred the powers of the Secretary of the Treasury over Indian affairs to the Secretary of the Department of the Interior. Title 43 U.S.C. § 1457 provides that "[t]he Secretary of the Interior is charged with the supervision of public business relating to the following subjects snd agencies: ... 10. Indians." Title 25 U.S.C. § 2 provides that "[t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." The President's regulatory power is contained in 25 U.S.C. § 9, which authorizes him to prescribe regulations "... for carrying into effect the various provisions of any act relating to Indian affairs ..."

Oklahoma v. United States, 139 F.2d 248 (10th Cir. 1943), cert. denied 321 U.S. 795, 64 S.Ct. 846, 88 L.Ed. 1084 (1944). However, the power of the Interior Department over Indians is not absolute.

> "The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some specific statutory or treaty provision."

Cohen at 103. See, e.g. Francis v. Francis, 203 U.S. 233, 27 S.Ct. 129, 51 L.Ed. 165 (1906); Jones v. Meehan, 175 U.S. 1, 20 S. Ct. 1, 44 L.Ed. 49 (1899). "However laudable may be the motives of the Secretary [of the Interior], he, as all others, is bound by the provisions of congressional legislation."[9] Ballinger v. Frost, 216 U.S.

9/ In the words of the Ninth Circuit, "[i]n his dealings with the Indians, the Secretary of the Interior does not have the power of an Asiatic potentate or even of a benevolent despot. He, like his wards themselves, is subject to legislative restrictions." United States v. Arenas, 158 F.2d 730, 747-748 (9th Cir. 1946).

240, 249, 30 S.Ct. 338, 340, 54 L.Ed. 464 (1910). An administrative official cannot exercise legislative power under the guise of regulation. United States v. George, 228 U.S. 14, 33 S.Ct. 412, 57 L.Ed. 712 (1913).

Within the framework of the foregoing principles of Indian law, it is necessary to examine the manner in which the Osages have exercised their sovereign power of self-government and the manner in which the United States has responded to that action. For the purpose of this case, the relevant starting point for such an examination is December 31, 1881, the date of the adoption of the Constitution of the Osage Nation. The Constitution establihsed a tripartite system of government modeled after that of the United States. Legislative power was vested in a National Council, composed of fifteen (15) members, three (3) elected from each of five (5) districts for terms

of two (2) years. The National Council was given, inter alia, the power "... to make all laws and regulations which they shall deem necessary and proper for the good of the Nation ..." and the power "... to make laws for levying and collecting taxes for the purpose of raising revenue." Executive power was lodged in the Principal Chief, who was given the responsibilities of seeing that the laws were faithfully executed, of approving or rejecting bills passed by the National Council, and of nominating three members of, and serving on, an Executive Council. The Constitution also created the office of Assistant Principal Chief, who was to act as Principal Chief in the absence of the Principal Chief, to advise the Principal Chief in the administration of the government, and to serve on the Executive Council. The Osage Constitution also created a judicial system, comprised of a Supreme Court and such Circuit and Inferior

Courts as established by the National Council.

The Osage Nation functioned under its constitutional form of government until 1900, when the Secretary of the Interior issued orders purportedly abolishing the tribal government, with the exception of the offices of Principal Chief and Assistant Principal Chief.[10] The Secretary ad-

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10/ Report of the Commissioner of Indian Affairs of October 1, 1900. Sources: 1 Washburn, The American Indian & the United States, 701; 5 Fay, Charters, Constitutions & By-Laws of the Indian Tribes of North America 102. See also H.R.Rep. No. 92-963, 92d Cong., 2d Sess. 7 (1972)(hereinafter referred to as "H.R.Rep. No. 92-963"); Hearing on S.1456 and S.3234 Before the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess., at 14 (1972)(hereinafter referred to as "Hearing on S.1456 and S. 3234"). The Interior Department gave the following as the reasons for its actions:

> "The principal causes that led to abolition of the Osage Tribal government were: (1) Acrimonious disputes between the two factions over elections; (2) entire absence of harmony between the Osage tribal officers and the Indian agent in the administration of tribal affairs; (3) the selection of ignorant men as officeholders, and (4) the profligate use of moneys received from permit taxes."

vised the Tribe that its affairs would thereafter be directly administered by the Bureau of Indian Affairs and the Department of the Interior.[11] However, the National Council failed to dissolve in response to the Secretarial orders.[12]

> "In 1903 the Secretary issued instructions that a Business Committee of eight members be formed, said members to be elected initially by the 'so-called Osage council' and thereafter by majority vote of the qualified voters of the tribe. When the executive council failed to take action on that directive, the Secretary requested the Principal Chief to select eight members of the existing council to serve with him on the first Business Committee, to act upon such matters as 'are brought before the council under the present arragement' and such other business as submitted to the Business Comittee by the Indian agent under direction of the Commissioner of Indian Affairs, with Secretarial approval." 13

(10/ cont.) Report of the Commissioner of Indian Affairs of October 1, 1900, supra.

11/ H.R.Rep. No. 92-963 at 7; Hearings on S.1456 and S.3234 at 14.

12/ Id.

(Footnote 13 on next page.)

H.R.Rep. No. 92-963 at 7; Hearings on S.1456 and S.3234 at 14. The so-called Business Committee was appointed by the Principal Chief and continued in existence until the passage of the Osage Allotment Act.[14]

[7] Before proceeding to analyze the Osage Allotment Act, the primary Congressional enactment involved in this case, it is necessary to examine the validity of the actions taken by the Secretary of the Interior in 1900 in purportedly abolishing the tribal government of the Osage Tribe. As we have seen, the Secretary does not have plenary authority over the exercise of sovereign powers by the Indian tribes. We have also seen that those powers are subject to

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13/ The letter from the Acting Secretary of the Interior to the Principal Chief of the Osage Nation requesting the formation of a Business Committee is reproduced in S.Rep. No. 4210, 59th Cong., 1st Sess. 4 (1906)(hereinafter referred to as "S.Rep. No. 4210").

14/ H.R.Rep. No. 92-963 at 7; Hearings on S.1456 and S.3234 at 14.

limitation only by the Congress. There is absolutely no indication that Congress in any way delegated, or attempted to delegate,[15] its power to abolish Indian self-government to the Secretary of the Interior. Under the circumstances, the Court is led to the inescapable conclusion that the Secretary of the Interior was attempting to exercise legislative power when he purportedly abolished the government of the Osage Nation in 1900 and that such action was therefore beyond the scope of his authority and of no legal effect. See Harjo v. Kleppe,

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15/ The Court is inclined to believe that such action by the Congress, if in fact taken, would have been an unlawful attempt to delegate its legislative power and therefore void. See United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932); Crain v. First National Bank of Oregon, Portland, 324 F.2d 532 (9th Cir. 1963); Board of Commissioners of Pawnee County, Oklahoma v. United States, supra. However, since the record reveals no attempt by Congress to delegate such power, the Court need not, and does not, decide the issue.

420 F.Supp. 1110 (D.D.C.1976). Consequently, at the time of the passage of the Osage Allotment Act, the Osage Nation was still functioning, as a matter of law, under its 1881 Constitution, and it becomes necessary to determine what action, if any, was taken by the Congress in that Act, or in subsequent legislation, to limit, expand or otherwise modify the government of the Osage Nation.

[8-11] There are several canons of construction and interpretation of Indian legislation which should be discussed before examining the acts relating to the Osages. The most general rule is that legislation affecting the Indians is to be liberally construed in their interest and doubtful expressions resolved in their favor. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 96 S.Ct. 1793, 48 L.Ed.2d 294 (1976); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138

(1918); United States v. Nice, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912); United States v. Celestine, 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909). Indian legislation must be construed in light of the common notions of the day, the assumptions of the draftsmen and the policy which the legislation was intended to execute.[16] Oliphant v. Suquamish Indian Tribe, supra; Levindale Lead Co. v. Coleman, 241 U.S. 432, 36 S.Ct. 644, 60 L.Ed. 1080 (1916). While the assimilationist policy prevailing at the beginning of the twentieth century must certainly be considered, it is important to note that present federal policy favors the strengthening of tribal self-government,[17] for

16/ In the case of the Osage Allotment Act, that policy was one of concern for the welfare of the Indians. Levindale Lead Co. v. Coleman, supra.

17/ Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).

> "... courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship'."

Bryan v. Itasca County, 426 U.S. 373, 389 n.14, 96 S.Ct. 2102, 2111, 48 L.Ed.2d 710 (1976). As the agency charged with the administration of Indian laws, the Interior Department's interpretation of those laws is entitled to "great weight." United States v. Jackson, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930). "However, the power to issue regulations is not the power to change the law," United States v. New England Coke & Coal Company, 318 F.2d 138, 143 (1st Cir. 1963), and it is the duty of the courts to determine if an agency's interpretation is consistent both with its earlier or later pronouncements and with the intent of Congress. Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 30 L.Ed.2d 270

(1974); United States v. New England Coke & Coal Company, supra. There is a presumption that a statute is not intended to make a radical change in Indian affairs, and courts must insist that such a purpose be made clear by Congress. United States v. Nice, supra; U. S. v. Celestine, supra. See also Bryan v. Itasca County, supra. In Harjo v. Kleppe, supra at 1142, the court summarized the applicable rules of construction in a case factually similar to the instant one, in which a claim was made that the government of the Creek Indians had been abolished:

> "Congress undoubtedly has the power ... to terminate the existence of the tribe entirely. However, because such an abolition of the Creek constitutional government would have been tantamount to a total repudiation of the tribe's right, ... to determine its own form of organization and government -- and indeed a final repudiation of tribal sovereignty itself -- familiar principles of statutory construction in general and of interpretation of federal Indian law in particular mandate that such congressional action be

> clear and explicit; where the statutes and their legislative histories fail to clearly establish such an intent, the Court may not supply one by judicial interpretation."

It is within the framework of the above rules of statutory construction that the Osage Allotment Act must be examined.

Section 1 of the Osage Allotment Act provided for a roll of the members of the tribe. Section 2 authorized a division of tribal lands among the members of the tribe as established in Section 1. All of the minerals contained on those lands were reserved to the Osage tribe for a period of twenty-five (25) years[18] in Section 3, which also authorized the execution of mineral leases. Section 4 provided that all monies due to the Osage tribe, including mineral royalties, were to be held in trust by the

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18/ This period has been extended several times. The most recent extension is until April 28, 1983, and thereafter until otherwise provided by Act of Congress. 78 Stat. 1008 (1964).

United States for a period of twenty-five (25 Years.[19] The funds so held were to be segregated and placed to the credit of the individual members of the tribe, each such member to receive a quarterly distribution of his pro-rata share of interest earned on the trust funds. Under the provisions of Section 5 of the Act, all lands, moneys and mineral interests were to become the absolute property of the individual members of the tribe at the end of the trust period. Sections 6, 7 and 8 of the Act provided for the inheritance of trust property, the right to lease the lands for agricultural purposes and the execution of deeds by the Principal Chief with the approval of the Secretary of the Interior, respectively. Section 9, the section primarily in issue in this case, provided for the election of tribal officers. Sections 10 and 11 reserved land for public

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19/ This period has also been extended. See note 18, supra.

highways and railroads, respectively, and Section 12 gave the Secretary of the Interior the authority to do all things necessary to carry into effect the provisions of the Act.

[12, 13] A closer examination of some of the language used by Congress in the Osage Allotment Act reveals, to a certain extent, its intent at the time it was enacted. Section 1 contains more than one provision of significance in the context of this case. That section described the roll of the Osage tribe and provided that it "... is hereby declared to be the roll of said tribe and to constitute the legal membership thereof." 34 Stat. at 540. Congress thereby exercised its plenary power to control membership in Indian tribes[20] and defined for all purposes the members of the Osage Tribe of Indians. Section 1 also gave

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20/ See Gritts v. Fisher, supra; Wallace v. Adams, supra.

to the Principal Chief the authority to file with the Secretary of the Interior a list of names which the tribe claimed were placed upon the roll by fraud. Significantly, Congress used the following language in that regard:

> "... [N]o name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution ..." 34 Stat. at 540. (Emphasis added).

Congress thereby explicitly acknowledged the existence of the Osage Constitution and gave no indication anywhere in the Act that it either intended to abolish the Constitution or considered it as having been previously abolished. Section 9 of the Osage Allotment Act provided in its entirely as follows:

> "That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers

> elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined." 34 Stat. at 545.

The section provided for the election of officers for the Osage tribe. Absent some limiting language, the Court must assume that Congress meant what it said and that such a reference was to officers of some type of general tribal government. The first election mandated by the section was

to be held in 1908, and the officers were to succeed the officers elected in 1906. Clearly, Congress intended that the officers elected in 1906, presumably under the Osage Constitution, would remain in office until the new election date in 1908. The use by Congress of the term "tribal council" in Section 9 may also have some significance, as that term has been used in other Indian legislation in obvious reference to the general governing body of a tribe.[21] The only specific functions delegated to the Tribal Council in the Act itself were the appointment of one member to a commission to divide Osage land among Osage tribal members,[22] the execution of mineral leases, with the approval of the Secretary of the Interior,[23] and the authority to requisition

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21/ See, e.g., 25 U.S.C. § 476.

22/ Section 2, paragraph 6, 34 Stat. at 541.

23/ Section 3, 34 Stat. at 543.

money from an emergency fund for the Osage tribe.[24] The plaintiffs contend that Congress gave to the Tribal Council the authority to perform only those functions, and no others. However, because the enumerated functions involved subject matters which were created by the Act, a delegation of responsibility in those areas to some person or entity was a necessity, and Congress' choice of the Tribal Coucnil is as consistent with its recognition of that body as a general legislative one as it is with an intent to limit the Council's authority exclusively to those functions. From an examination of the language of the Osage Allotment Act, the Court is led to the conclusion that Congress intended only to expand the authority of the Tribal Council and to modify the procedure for the elec-

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24/ Section 4, paragraph 4, 34 Stat. at 544.

tion of tribal officers,[25] and neither to abolish the officers already in existence nor to create entirely new ones.[26] It

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25/ The details of the election procedures are set forth in 25 C.F.R. § 73.1 et seq. Section 73.21 provides that

> "[o]nly members of the Osage Tribe who will be twenty-one years of age or over on election day and whose names appear on the quarterly annuity roll at the Osage Agency as of the last quarterly payment immediately preceding the date of election will be entitled to hold office or vote for any tribal officers."

One of the plaintiffs' primary objections to the exercise of general legislative authority by the Osage Tribe Council is that the Council represents only those who have an interest in the mineral estate. However, as previously noted, Section 1 of the Act limited the tribal membership to that class of Osage Indians. Therefore, Congress has withdrawn from all those Osages not included in the tribe as defined in Section 1 the right to participate in the tribal government and, consequently, the right to complain of the inability to so participate. The right to representation in the Osage tribal government is an issue which can only be resolved by legislative enactment, and not by judicial decree.

26/ The limited number of cases involving Section 9 of the Act are not inconsistent with this Court's interpretation. For instance, in discussing that section, the court in United States v. Board of Commissioners of Osage County, Oklahoma, 193 F. 485, 489 (W.D.Okl.1911), said that "... it

would not have been difficult for Congress to explicitly abolish the tribal government, or any part of it, had that been its intent.

The legislative history of the Osage Allotment Act[27] is not inconsistent with this Court's interpretation of the intent of Congress.[28] As originally proposed, the

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26/(cont.) was well known that ample interest would in the future continue to command the attention of the tribal organization ..." (Emphasis added). In United States v. Aaron, 183 F. 347, 349 (W.D.Okl.1910), the same court noted that "... the act of June 28, 1906 ... recognizes a continuation of the tribe. Section 9."

27/ The Court requested that each party submit copies of the legislative history which supported its position. The plaintiffs submitted exerpts from the histories of the Osage Allotment Act and subsequent Osage legislation. The defendants have taken the position that legislative histories are irrelevant to this case and therefore did not submit any such material to the Court.

28/ As originally proposed, the Act provided for the perpetual continuance of the Tribal Council. The Commissioner of Indian Affairs recommended that the Council be abolished at the expiration of the trust period. See S.Rep. No. 4210 at 4. The plaintiffs contend that this recommendation, which was not adopted by Congress, as well as subsequent legislation which did so

Act would have given the Tribal Council the right to select a majority of the members of the allotting commission. The Commissioner of Indian Affairs urged that the provision be changed, as it ultimately was, for the following reason:

> "... I would say that it is known to this Department by unquestioned proof, if not by the admissions of the members themselves, that certain members of the Osage Council are absolutely corrupt. This being true, it is believed that the selection of a majority of the allotting commission by the council might be fatal to the interests of very many of the Indians, and it should not be allowed." (Emphasis added).

28/(cont.) limit the Council's existence, 45 Stat. 1478 (1929), somehow indicates that Congress intended to limit the authority of the Tribal Council exclusively to matters related to the trust estate. However, Congress similarly limited the existence of the governments of other tirbes, e.g. the Five Civilized Tribes (Choctaw, Chickasaw, Cherokee, Creek and Seminole), which clearly had responsibilities unrelated to trust property. See, e.g., 34 Stat. 822 (1906); 34 Stat. 137 (1906); 30 Stat. 495 (1898). Consequently, the Court does not consider the Commissioner's recommendation, or the 1929 legislation, to be inconsistent with its interpretation of Congressicnal intent.

S.Rep. No. 4210 at 5. The Interior Department also supported the amendment to Section 9 which gave the Secretary ultimate control over membership in the Council. The Commissioner felt that "... because it has been found that certain members of the tribal council are corrupt it is believed that the Secretary of the Interior should have the power to dismiss any councilman for good and sufficient cause." Id. at 6. (Emphasis added). The Secretary himself stated that "[t]his amendment I must insist upon in view of the recent attempted frauds and actual bribery which have been acknowledged by the members of the present council, the absolute control of which must be vested in the Department ..." Id. at 7. It is clear that the Department of the Interior was concerned with the character of the members of the Council as it then existed and as it was to continue under the Osage Allotment Act and the Osage Constitution. Its

concern would not have been as great, or of the same nature, had the intent been to completely abolish the existing Tribal Council.

The plaintiffs also contend that subsequent legislation dealing with the Osages, and its legislative history, supports their interpretation of the intent of Congress at the time of the passage of the Osage Allotment Act. The Court does not agree. The primary substantive amendment to Section 9 is found in an Act of March 2, 1929, 45 Stat. 1478. The amendment changed the biennial election to a quadrennial one, gave removed officers due process rights and added the following phrase to Section 9: "... [S]aid tribal government so constituted shall continue in full force and effect to January 1, 1959." (Emphasis added). In similar statutes dealing with the Five Civilized Tribes, the term "tribal government" was obviously meant to refer to a

government with broad and general powers.[29] The plaintiffs also rely upon several appropriations acts. For instance, Congress has authorized the expenditure of Osage trust funds for the education of Osage children,[30] the employment of special counsel to assist in the prosecution of those charged with the murder of Osage Indians,[31] necessary expenses in connection with oil and gas production[32] and per diem and travel expenses of Council members.[33] Plaintiffs argue

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29/ See, e.g., 34 Stat. 822 (1906); 34 Stat. 137 (1906); 32 Stat. 982 (1903); 30 Stat. 493 (1898).

30/ See, e.g., 63 Stat. 765, 775 (1949); 62 Stat. 1112, 1122 (1948); 61 Stat. 460, 469 (1947); 42 Stat. 552, 574 (1922); 41 Stat. 1225, 1241 (1921).

31/ See 44 Stat. 453, 476 (1926).

32/ See, e.g., 63 Stat. 765, 775 (1949); 62 Stat. 1112, 1122 (1948); 61 Stat. 460, 469 (1947); 44 Stat. 453, 476 (1926); 42 Stat. 552, 574 (1922); 41 Stat. 1225, 1241 (1921).

33/ Id; 52 Stat. 1034, 1035 (1938). It should be noted that the expenses of Council members were to be paid when they were "... engaged on business of the tribe necessary trips to the city of Washington and

that the appropriations acts "empowered" the Tribal Council to perform the functions for which the funds were to be spent. However, those acts merely authorized expenditures "... from the funds held by the United States in trust for the Osage Tribe of Indians in Oklahoma." Absent such express authorization by Congress, those expenditures would have been in violation of the terms of the trust established under the Osage Allotment Act, and that authorization cannot be construed as a grant of power to a body otherwise limited in authority to the terms of the Allotment Act.

[14, 15] The plaintiffs also rely upon the legislative histories of subsequent Osage legislation, primarily that relating to the 1972 legislation providing for the distribution of judgment funds to the Osage

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33/(cont.) other places in connection with Osage tribal affairs." (52 Stat. at 1035). Such language does not indicate that the Tribal Council is limited only to matters involving the trust estate.

Nation.[34] Those histories do contain statements made by officials of the Department of the Interior to the effect that the Allotment Act had "... created a Tribal Council to manage the mineral rights and to dispose of other tribal assets,"[35] and that "... the tribal council's powers are limited to actions taken within the purview of the mineral trust estate."[36] However, not even legislative declarations of the intent of a previous act are not absolutely controlling. Levindale Lead Co. v. Coleman, supra, and plaintiffs are relying upon an agency's interpretations which are inconsistent with statements made both at the time the Act in issue was passed and at the present time and which the Court finds to be inconsistent with the intent of Congress. Therefore, the Court does not consider those

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34/ 25 U.S.C. § 883 et seq.

35/ Hearing on S.1456 and S.3234 at 10.

36/ Id.

interpretations of the Department of the Interior to be controlling in this case.

[16] A comparison of the Osage Allotment Act with other Indian legislation is helpful in determining the intent of Congress when it enacted the former. In its statutes dealing with the Five Civilized Tribes, Congress continually and explicitly provided for the termination of the tribal governments in the year 1906.[37] On March 2, 1906, Congress extended the existence of the tribes and their governments until the distribution of all tribal property to individual tribal members.[38] In the Act of April 26, 1906, 34 Stat. 137, providing for the final disposition of the affairs of the Five Civilized Tribes, reference was made throughout to the dissolution of the tribal governments. The Osage Allotment Act was

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37/ 30 Stat. 495, 512 (1898); 31 Stat. 861, 872 (1901); 32 Stat. 716, 725 (1902); 32 Stat. 982, 1008 (1903).

38/ 34 Stat. 822.

passed on June 28, 1906 and contained no reference to the termination of the Osage tribal government. The Five Civilized Tribes legislation, enacted within months of the Osage Allotment Act, "... is cogent proof that Congress knew well how to express its intent directly when that intent was to [terminate tribal governments]." Bryan v. Itasca County, supra, 426 U.S. at 389, 96 S.Ct. at 2111. Congress has passed two acts dealing with the constitutional organization of Indian tribes: the Wheeler-Howard Act, also known as the Indian Reorganization Act, 25 U.S.C. § 476, and the Oklahoma Indian Welfare Act, 25 U.S.C. § 503. Neither act applies to the Osage tribe,[39] and the plaintiffs contend that the tribe has thereby been rendered powerless to adopt a constitution. However, absent express legislation to the contrary,

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39/ See 25 U.S.C. §§ 473 and 508.

the Osage tribe possesses the inherent sovereign power to form a constitutional government, irrespective of any authority which might have been granted in those two acts. See Harjo v. Kleppe, supra; Cohen at 129-130.

To accept the plaintiffs' arguments, the Court would have to impute to Congress an intent to leave the Osage as virtually the only tribe of Indians in the United States without a general governing body or the right to establish such a body. Before the Court would reach such a conclusion, it would require the intent of Congress to be clear and explicit to a degree far beyond that demonstrated in the record of this case.[40]

The plaintiffs also allege that tribal trust funds have been improperly spent in

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40/ For a case in which a similar determination was made by a Court presented with an analogous factual situation, see Harjo v. Kleppe, supra.

support of activities which are unrelated to the management of the Osage mineral estate. All defendants admit that such expenditures have been made, in the approximate amount of $23,986.77 during the past four years, but contend that such funds represent only a fraction of the income received by the trust during that period and were wisely invested in programs which benefitted all Osage Indians.

[17, 18] The United States serves in a ficuciary capacity with respect to the Indians, and it is therefore duty bound to exercise great care in administering its trust. United States v. Mason, 412 U.S. 391, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973).

> "[The United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting ficuciary standards."

Seminole Nation v. United States, 316 U.S.

286, 297, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942).

> "A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor's directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretion in administering the trust."

Bogert, Trusts & Trustees § 541 at 155 (Rev. 2d ed. 1978). The terms of the trust in issue here were established in Section 4 of the Osage Allotment Act. Expenditures such as those admittedly made by the defendants in this case are not among those authorized by that Act or by any other legislation of which the Court is aware. Therefore, under the principles of ordinary trust law, and especially the principles applicable to the relationship between the United States and the Indian tribes, the use of Osage trust funds for purposes not specifically authorized by Congress is clearly improper.

For the foregoing reasons, plaintiffs' motion for summary judgment is sustained in part and overruled in part. Judgment is hereby entered declaring that the power of the Osage Tribal Council is not limited to those matters specified by the Act of June 28, 1906, as amended, and further declaring that funds held in trust by the United States for the Osage Tribe of Indians, pursuant to the Act of June 28, 1906, may be used only as specifically authorized by Congress.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEROY LOGAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 77-C-363-C
	)	
CECIL D. ANDRUS, Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

The Court has before it for consideration the plaintiffs' motion to vacate judgment, to which all defendants object. The Court is convinced that its Order of October 5, 1978 adequately and correctly disposed of the issues raised and the relief requested in the plaintiffs' complaint. The constitutionality of the Osage Allotment Act was never an issue before this Court, and to grant the relief requested by plaintiffs in their motion would be to expand the scope of this case far beyond that within which it has proceeded since its inception. Accord-

ingly, plaintiffs' motion to vacate judgment is hereby overruled.

It is so Ordered this 29th day of December, 1978.

H. DALE COOK
United States District
Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 79-1294

LEROY LOGAN, et al.,	)
	)
Plaintiffs-Appellants,	) On Appeal From
	) The United States
v.	) District Court
	) For The Northern
CECIL D. ANDRUS, Secretary of the Interior, et al.,	) District of Oklahoma (D.C. No. 77-C-363-C)
	)
Defendants-Appellees.	)

Before SETH, Chief Judge, McKAY, Circuit Judge, and CHRISTENSEN, District Judge*.

SETH, Chief Judge.

This action was started by appellant Logan and six other persons who assert they are Osage Indians and who each own headrights or shares in the Osage mineral estate. The defendants are the Secretary of the Interior, the Commissioner of Indian Affairs,

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*/ Of the United States District Court for the District of Utah, sitting by designation.

and also the Osage Tribal Council which the trial court joined as a necessary party defendant.

The complaint sought declaratory relief in a relatively narrow area. This was a declaration that the Osage Tribal Council was limited in its powers to the administration of the Osage mineral estate and not to include authority to participate in or represent the Osage Tribe in the various federal programs made available to entities such as the Tribe. The plaintiffs asserted that the federal defendants could not properly authorize the Council to participate in such programs. The Tribal Council argued that it did have the powers and duties relating to the Osage mineral lands under the Osage Allotment Act of June 28, 1906, and that it also had the typical powers and authority of a tribal council.

The trial court concluded that the Council was vested with the powers relating

to the mineral estate under the 1906 Act, and that it also had the general powers of any other tribal council as the Osage "tribal government." The court further held that the Council was required under the 1906 Act to use the funds derived from the mineral estate only for the benefit of the owners of headrights and not for the benefit of the Tribe generally or for non-owners of headrights. The trial court so entered judgment.

Thereafter the plaintiffs moved to vacate the judgment on the ground that the 1906 Act was unconstitutional in that it limited the right to vote for Council candidates to those who owned headrights. The court denied the motion on the ground that the issue had not been raised in the pleadings and the parties had not addressed it, and also because the plaintiffs were the owners of headrights and could vote. Thus there were no parties plaintiff who could

assert that they were denied the right to vote.

The trial court decided the issues raised by the plaintiffs and we find no error in its refusal to consider the constitutional issue relating to voting rights raised in the post-judgment motion.

The Osage Allotment Act of June 28, 1906 set up the machinery for the administration of the Osage mineral estate and described and declared the rights vested in the individuals. The issues on appeal are concerned in this administration and it is apparent that the Osage Council was responsible under the Act for the business side and the money. The method for selection of the members of the Council and the officers of the Tribe was described in the Act. Thus the Act in paragraph 9 (34 Stat. 545) states that there shall be a biennual election "of officers for the Osage tribe as follows: A principal chief, an assistant principal

chief, and eight members of the Osage tribal council." The statute was basically for allotments but this portion in no way limited the authority of the officers therein named in mineral administration or any other specific function. The officials to be elected were described in terms or titles used for typical tribal government positions, thus "principal chief" and the "Osage tribal council." The tribal government for all practical purposes was so organized under the 1906 Act and exercised general authority.

In 1929 (45 Stat. 1478) Congress again considered the matter of Osage tribal officers. This 1929 Act reenacted the portion of the 1906 Act quoted above except that it provided for quadrennial elections for the officers of the Osage Tribe and for some additional provisions for vacancies and removal of Council members. It concluded with the provision that "said tribal government so constituted shall continue in full force

and effect to January 1, 1959." (There were later extensions.) The congressional description of the officers and Council as the "tribal government" is significant and resolves the question of the Council's general authority again within prevailing concepts of sovereignty as described by the courts. The Council had in 1929 been functioning for over twenty years.

The Act of 1906 and the amendment provided the powers of the Council as to the mineral estate and (limited the use of funds derived from mineral lands), and also provided the general authority of the Council. This general authority encompassed the right to include the Tribe as a participant in various federal programs. These were the only issues raised during the litigation by the plaintiffs.

The right to vote under the 1906 Act was limited to owners of headrights. However, at the time this included all enrolled

Osage Indians, and thus all could vote. However, at present many persons who assert they are Osages do not have headrights and thus cannot vote for the Council. This issue was not considered by the trial court because, as mentioned above, it was not raised until the post-judgment motions were filed. The voting as a constitutional question or as any other question did not arise as anything more than an academic issue and after judgment, one which was important, but again the parties who might be directly concerned were not before the court. The voting plaintiffs were not in a position to assert rights belonging to others. Those persons who could raise the voting issue have several adequate and available remedies. See O'Shea v. Littleton, 414 U.S. 488, Eisenstadt v. Baird, 405 U.S. 438, and Bode v. Barrett, 344 U.S. 583. Under these circumstances we hold that the trial court was correct in not considering the issue. The

matter cannot be raised independently in this court. Stephens Industries, Inc. v. Haskins and Sells, 438 F.2d 357 (10th Cir.); Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir.).

The trial court considered the validity of the 1881 Osage Constitution, but its application or validity was not an issue and had not been treated by the parties as a matter to be considered. Under the conclusion reached by this court no rights or authority are derived from the 1881 Constitution. Since the trial court made a specific holding as to its validity which has implications beyond this case, it is reversed in order that there be no misunderstanding that it must remain as a matter not decided. The validity of the 1881 Constitution, whether any elements remain, or whatever its status, thus stand as issues not adjudicated in this action.

The determination of the Council's

authority and duties is based on the 1906 Act, and its amendments, together with the general usage and prevailing concepts as to the authority of the tribes to govern themselves, but only as described in the opinions of the Supreme Court and of other federal and state courts.

We thus affirm the conclusion of the trial court that the powers of the Osage Council include the authority to cause the Tribe to participate in the various programs challenged in this action, and also to administer the Osage mineral estate in accordance with the 1906 Act. The funds derived therefrom are required to benefit only the owners of shares therein. It is so ordered.

(Filed: February 3, 1981)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof:

Provided, That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons

were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and

ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; and the adult members shall select their first selections and

file notice of the same with the United States Indian agent for the Osages within three months after the approval of this Act: Provided, That all selections of lands heretofore made by any member of said tribe, against which no contest is pending, be, and the same are hereby, ratified and confirmed as one of the selections of such member. And if any adult member fails, refuses, or is unable to make such selection within said time, then it shall be the duty of the United States Indian agent for the Osages to make such selection for such member or members, subject to the approval of the Secretary of the Interior. That all said first selections for minors shall be made by the United States Indian agent for the Osages, subject to the approval of the Secretary of the Interior: Provided, That said first selections for minors having parents may be made by said parents, and the word "minor" or "minors" used in this

Act shall be held to mean those who are under twenty-one years of age: And provided further, That all children born to members of said tribe between January first, nineteen hundred and six, and the first day of January, nineteen hundred and seven, shall have their selections made for them within six months after approval of this Act, or within six months after their respective births. That all children born to members of said tribe on and after the first day of January, nineteen hundred and seven, and before the first day of July, nineteen hundred and seven, shall have their selections made for them on or before the last day of July, nineteen hundred and seven, the proof of birth of such children to be made to the United States Indian agent for the Osages.

Second. That in making his or her first selection of land, as herein provided for, a member shall not be permitted to

select land already selected by, or in possession of, another member of said tribe as a first selection, unless such other member is in possession of more land than he and his family are entitled to for first selections under this Act; and in such cases the member in possession and having houses, orchards, barns, or plowed land thereon shall have the prior right to make the first selection: Provided, That where members of the tribe are in possession of more land than they are entitled to for first selections herein, said members shall have sixty days after the approval of this Act to dispose of the improvements on said lands to other members of the tribe.

Third. After each member has selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection.

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections: Provided, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot." Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus

land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

Sixth. The selection and division of lands herein provided for shall be made under the supervision of, or by, a commission consisting of one member of the Osage tribe, to be selected by the Osage council, and two persons to be selected by the Commissioner of Indian Affairs subject to the approval of the Secretary of the Interior; and said commission shall settle all controversies between members of the tribe

relative to said selections of land; and the schedules of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior. The surveys, salaries of said commission, and all other proper expenses necessary in making the selections and division of land as herein provided shall be paid by the Secretary of the Interior, out of any Osage funds derived from the sale of town lots, royalties from oil, gas, or other minerals, or rents from grazing land.

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years,

or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress: And provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other

minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: And provided further, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

Eighth. There shall be reserved from selection and division, as herein provided, one hundred and sixty acres on which the Saint Louis School, near Pawhuska, is located, and the one hundred and sixty acres on which the Saint John's School, on Hominy Creek, Osage Indian Reservation, is located, said tracts to conform to the public surveys; and said tracts of land are hereby set aside and donated to the order of the Sisters of Saint Francis; and said

tracts shall be conveyed to said order, the Sisters of Saint Francis, as early as practicable, by deed. There shall also be reserved from selection and division forty acres of land near Gray Horse, to be designated by the Secretary of the Interior, on which are located the dwelling houses of John N. Florer, Walter O. Florer, and John L. Bird; and said John N. Florer shall be allowed to purchase said forty acres at the appraised value placed thereon by the Osage Allotting Commission, the proceeds of the sale to be placed to the credit of the Indians and to be distributed like other funds herein provided for.

Ninth. There shall be reserved from selection and division, as herein provided, the northeast quarter of section three, township twenty-five, range nine east, of the Indian meridian, and one hundred and sixty acres to conform to the public survey at the town of Gray Horse, including the

Government doctor's building, other valuable buildings, and the cemetery, and the one hundred and sixty acres to conform to the public survey, adjoining or near the town site of Hominy; said lands or tracts are hereby set aside for the use and benefit of the Osage Indians, exclusively, for dwelling purposes, for a period of twenty-five years from and after the first day of January, nineteen hundred and seven: Provided, That said land may, in the discretion of the Osage tribe, be sold under such rules and regulations as the Secretary of the Interior may prescribe; and the proceeds of the same under such sale shall be apportioned and placed to the credit of the individual members of the tribe according to the roll herein provided for.

Tenth. The Osage Boarding School reserve of eighty-seven and five-tenth acres, and the reservoir reserve of seventeen and three-tenths acres, and the agent's

residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska, as shown by the official plat of the same, are hereby reserved from selection and division as herein provided; and the same may be sold in the discretion of the Osage tribe, under such rules and regulations as the Secretary of the Interior may provide; and the proceeds of such sale shall be apportioned and placed to the credit of the individual members of said tribe according to the roll herein provided for.

Eleventh. That the United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which the said buildings are situated, shall be sold to the highest bidder as early as practicable, under such rules and regulations as

the Secretary of the Interior may prescribe; and with the proceeds he shall erect other suitable buildings for the uses mentioned, on such sites as he may select, the remaining proceeds, if any, to be placed to the credit of the individual members of the Osage tribe of Indians: Provided, That the house known as the chief's house, together with the lot or lots on which said house is located, and the house known as the United States interpreter's house, in Pawhuska, Oklahoma Territory, together with the lot or lots on which said houses are located, shall be reserved from sale to the highest bidder and shall be sold to the principal chief of the Osages and the United States interpreter for the Osages, respectively, at the apprised value of the same, said appraisement to be made by the Osage townsite commission, subject to the approval of the Secretary of the Interior.

Twelfth. That the cemetery reserve of

twenty acres in the town site of Pawhuska, as shown by the official plat thereof, is hereby set aside and donated to the town of Pawhuska for the purposes of sepulture, on condition that if said cemetery reserve of twenty acres, or any part thereof, is used for purposes other than that of sepulture, the whole of said cemetery reserve of twenty acres shall revert to the use and benefit of the individual members of the Osage tribe, according to the roll herein provided, or to their heirs; and said tract shall be conveyed to the said town of Pawhuska by deed, and said deed shall recite and set out in full the conditions under which the above donation and conveyenace are made.

That the provisions of an Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen

hundred and six, and for other purposes," approved March third, nineteen hundred and five, relating to the Osage Reservation, pages one thousand and sixty-one and one thousand and sixty-two, volume thirty-three, United States Statutes at Large, be, and the same are hereby, continued in full force and effect.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for aperiod of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That

the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

SEC. 4. That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

First. That all the funds of the Osage

tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid

quarterly to the parents until said minor arrives at the age of twenty-one years: Provided, That if the Commissioner of Indian Affairs becomes satisfied that the said minor is being misued or squandered he may withhold the payment of such interest: And Provided further, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

Second. That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit

of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States as herein provided.

Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases, and

moneys received from the sale of town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and an emergency fund for the Osage tribe, which shall be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said

members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

SEC. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise

specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

SEC. 8. That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior.

SEC. 9. That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the

Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resognation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause,

to be by him determined.

SEC. 10. That public highways or roads, two rods in width, being one rod on each side of all section lines, in the Osage Indian Reservation, may be established without any compensation therefor.

SEC. 11. That all lands taken or condemned by any railroad company in the Osage Reservation, in pursuance of any Act of Congress or regulation of the Department of the Interior, for rights of way, station grounds, side tracks, stock pens and cattle yards, water stations, terminal facilities, and any other railroad purpose, shall be, and are hereby, reserved from selection and allotment and confirmed in such railroad companies for their use and benefit in the construction, operation, and maintenance of their railroads: Provided, That such railroad companies shall not take or acquire hereby any right or title to any oil, gas, or other mineral in any of said lands.

SEC. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

Approved, June 28, 1906.

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No. 80-1848

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY LOGAN, RAYMOND LASHLEY, FRANCES HOLDING, HAZEL HARPER, ARITA JUMP, ANTHONY DANIELS, and ROSA JAKE

Petitioners

v.

JAMES G. WATT, Secretary of the Interior; BENJAMIN REIFEL, Commissioner of Indian Affairs; OSAGE TRIBAL COUNCIL,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR OSAGE TRIBAL COUNCIL IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the United States District Court for the Northern District of Oklahoma, as affirmed by the United States Court of Appeals for the Tenth Circuit, correctly concluded that the power of the Osage Tribal Council is not limited to those matters specified by the Act of June 28, 1906, as amended.

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No. 80-1848

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR OSAGE TRIBAL COUNCIL IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is unreported at this date. (Pet. App. A-45). The opinion of the District Court is reported at 457 F. Supp. 1318. (Pet. App. A-1—A-42).

JURISDICTION

The opinion of the Court of Appeals was entered on February 3, 1981, and this Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Osage Allotment Act, 34 Stat. 539, of June 28, 1906, as amended. (Pet. App. A-54).

STATEMENT

A brief statement concerning the history of the Osage Tribe of Indians would be appropriate at this time. As Petitioners acknowledge, the Osage Nation, prior to the enactment of the Allotment Act of June 28, 1906, did have a Constitution and the government consisted of a legislative judicial and executive branch. This form of government was purportedly abolished by Secretarial order, the validity thereof in said order not having been defined by judicial opinion. The Osage Reservation which is in Osage County, Oklahoma, and consisting of approximately 1,500,000 acres was purchased from the Cherokee Tribe of Indians on June 4, 1883. Payment was made from the Osages to the Cherokees as was authorized by an Act of March 3, 1873, 17 Stat. 530. The deed conveyed the Osage Reservation to the United States of America in trust for the use and benefit of the Osage and Kansas Indians. The Act of June 28, 1906, Chapter 3573, §2, 34 Stat. 539, allotted the surface of the land with certain exceptions

among 2,229 Osage Indians. Section 3 thereof reserved the mineral interests, consisting of oil, gas, coal or other minerals in communal ownership for a period of 25 years. Each allottee received a 1/2229 interest in the Osage Tribal mineral income commonly referred to as an "Osage Headright Interest." The mineral extension has been extended several times over a period of years, the latest such extension continuing "in perpetuity" by Act of October 21, 1978, 92 Stat. 1660.

This case was originally filed in the United States District Court for the District of Columbia by the Petitioners against the Secretary of the Interior and the Commissioner of Indian Affairs. The case was subsequently removed to the United States District Court for the Northern District of Oklahoma and the Respondent below, the Osage Tribal Council, was named as an additional party defendant. The complaint for declaratory relief as sought by the Petitioners below requested judgment declaring that the power of the Osage Tribal Council is limited to those matters specified by an Act of June 28, 1906, as amended. The suit further sought a finding that the federal defendants had exceeded their authority by aiding and abetting and approving the actions of the Osage Tribal Council. The Osage Tribal Council filed a Motion to Dismiss based upon lack of jusisdiction contending that Plaintiff's complaint against the Osage Tribal Council was not a matter of federal court jurisdiction, but rather an

intra-tribal dispute. This Motion to Dismiss was denied and Plaintiffs urged their Motion for Summary Judgment. The judgment was entered declaring that the powers of the Osage Tribal Council is not limited to those matters specified by the Act of June 28, 1906, as amended, and the opinion further declared that the funds held in trust by the United States for the Osage Tribe of Indians pursuant to the Act of June 28, 1906, may be used only as specifically authorized by Congress. (Pet. App. A-1—A-44) and an appeal was made to the United States Court of Appeals for the Tenth Circuit, which affirmed the decision of the District Court. (Pet. App. A-45—A-54).

The Plaintiffs' suit challenged the exercise by the Osage Tribal Council to participate in various governmental programs and further that the approval by the federal defendants of the Osage Tribal's action was in excess of the statutory authority for the Secretary of the Interior and the Commissioner of Indian Affairs. The Osage Tribal Council contended in the court below that they did have programs available for members of the Osage Tribe, as well as other tribes of Indians in Osage County, Oklahoma, and that said programs were made available from the United States Department of Labor, Housing and Urban Development, Health, Education and Welfare and the United States Department of Commerce. Further, that the Osage Tribal Council was in receipt of revenue sharing funds from the appropriate governmental agency

and did disburse these funds in accordance with the laws and guidelines. The Osage Tribal Council did contend that the Osage Allotment Act of 1906 specifically delegated the matters of minerals to the Council but did not take away the Osage Tribe's inherent sovereign powers.

The District Court, in its opinion, 457 F.Supp. 1318, provided soundly and clearly the answer to Petitioners' proposition as to whether or not the Osage Tribal Council is limited to those matters set forth in the June 28, 1906 Act, as amended. The decision is concise and succinct and does not create more confusion for the Petitioners in interpreting their rights as contended in Petitioners' Petition to the Court. Petitioners are owners of "headright" interest in the mineral estate and eligible to vote in Tribal elections and the decision does not interfere with or cause "irreparable injury" as alleged.

ARGUMENT

1. The District Court's decision was not attacked by the Petitioners on the points of law on which the Court made and sustained the basis of its declarations. The District Court's decision and of which Petitioners do not contend are erroneous nor do they cite any authorities in their briefs as to the following tenets of law as found by the Court, to wit (Pet. App. A-4—A-9): (1) Indian tribes have always been considered as distinct, independent political communities; (2) Indian self-government includes

the power of an Indian tribe to operate under a form of government of the Indians' choosing; (3) the power of Congress to eliminate the powers of local self-government which tribes otherwise possess; and (4) Indian tribes possess an inherent sovereignty except where it has been taken away from them by treaty or Acts of Congress. The District Court's decision is reported in 457 F.Supp. 1318. The above principles of law aided the District Court to answer the question as to whether or not the Osage Tribal Council's authority is limited by the Act of 1906, as amended, are lawfully and ably supported by citations of case law made by the Court.

2. The decision of the District Court and Court of Appeals took the Act of 1906 and the amendments thereto for what they actually say while Petitioners apparently have turned to other sources and presumptions as to the meaning of the Act of 1906. Reference is made to the June 28, 1906 Act and Section 9 thereof, in which the Osage Tribal Council was created:

> "That there shall be a bi-annual election of officers *for the Osage Tribe* as follows: a Principal Chief, an Assistant Principal Chief, and eight members of the Osage Tribal Council, . . . " (emphasis added)

The statute says that the eight members of the Osage Tribal Council are officers for the Osage Tribe. There is no restriction that they act only in the matters of minerals.

Nowhere in the Act is there any language eliminating any powers of the Osage Tribe in the conduct of their tribal affairs. Sovereignty remains as Congress did not take it away. Reference is made to the Act of March 2, 1929, Chapter 493, Section 7, Page 1481 (45 Stat. 1478), Congress addressed the subject again on the matter of officers of the Osage Tribe using the following language:

> "Section 7: That Section 9 of the Act of Congress approved June 28, 1906, 34th Statutes at Large, Page 539, be, and the same is hereby amended to read as follows: 'That there shall be a quadrennial election of *officers of the Osage Tribe* as follows: a Principal Chief, an Assistant Principal Chief and eight members of the Osage Tribal Council to succeed the officers elected in the year 1928, said officers to be elected at a general election to be held in the Town of Pawhuska, Oklahoma, on the first Monday in June, 1930, and on the first Monday in June each four years thereafter in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of four years commencing on the first day of July following said elections and in case of vacancy in the office of Principal Chief or other such officer by death, resignation or otherwise, the vacancies of the Osage Tribal Council shall be filled in a manner to be prescribed by the Osage Tribal Council and the Secretary of the Interior is hereby authorized to remove from the Council any member or members thereof for good cause to be by him determined, after the party involved has had due notice and opportunity to appear and de-

> fend himself, *and said Tribal government so constituted* shall continue in full force and effect to January 1, 1959.' " (emphasis added).

There have been successive amendments for the continuation of the Osage Tribal Council under the 1906 Act of the present.

It is clear that the Congress not only called the Osage Tribal Council as officers of the Osage Tribe, but it further called the Osage Tribal Council and the Chief and Assistant Chief the *Tribal government.*

3. Petitioners have referred to legislative history in support of their position. In this regard, reference is made to 73 Am. Jur. 2nd Stat. 151 wherein it is said:

> "Moreover, the legislative history of the statute may not compel a construction at variance with its plain words, *Kuhner v. Irving Trust Company,* 299 U.S. 445, and where the language of the statute is unambiguous consideration of the history of the legislation is not permissible, *Fairport Railway Company v. Meredith,* 292 U.S. 589."

Also see: *Railroad Commissioners of Wisconsin v. Chicago B & O Railway Company,* 257 U.S. 563, wherein it is said:

> "Where there may be no resort to the legislative history of the enactment of the statute, the language of which is plain and unambiguous, since such legislative history may only be resorted to for the purpose of sovereign doubt and not for the purpose of creating it."

The Court said at Page 1327 of its decision (457 F.Supp. 1318) (Pet. App. A-28-29):

> "From an examination of the Osage Allotment Act, the court is lead to the conclusion that Congress intended only to expand the authority of the Tribal Council and to modify the procedure for election of Tribal officers, and neither to abolish the officers already in existence nor to create entirely new ones. It would not have been difficult for Congress to explicitly abolish the Tribal government or any part of it had that been its intent."

4. The contentions of Petitioners (Pet. App. 19, 22, 29) rests on an erroneous reading of opinions below. Federal Indian law holdings were applicable and consistent to reach the conclusion of the Courts. The matter of voting, the historical reference to an 1881 Constitution were never issues in the pleadings or briefs of the District Court until the Judgment was rendered. Petitioners do have voting rights and have no standing to challenge for rights belonging to others. *Shea v. Littleton,* 414 U.S. 488, *Eisenstadt v. Baird,* 405 U.S. 438.

That the Petition attempts to subject issues into the case that were not there before the decision and affirmation thereof. The Act as defined by the Court does not place any other Act of Congress in Constitutional jeopardy.

CONCLUSION

The decision as affirmed does not conflict with any federal decision nor State Court. The decision answered the Petitioners' question as to the authority of the Osage Tribal Council. Petitioners are making inferences and presumptions not a part of this case.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 80-1848

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY LOGAN, ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Osage Tribal Council has the authority to participate, on behalf of the Tribe, in certain federal programs, and to engage in certain other activities unrelated to the management of the Osage mineral estate.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-45 to A-53) is reported at 640 F.2d 269. The opinion of the district court (Pet. App. A-1 to A-44) is reported at 457 F. Supp. 1318.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1981. The petition for a writ of certiorari was filed on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Osage Allotment Act, ch. 3572, 34 Stat. 539, established the Osage Tribal Council, an eight-member body. 34 Stat. 545. The Act also directed that a roll be made of members of the Tribe. The Osage land was divided among the enrolled members (34 Stat. 540-543); the minerals found on the land were placed in trust (34 Stat. 543-544). Each enrolled member was given what is now called a "headright," the right to an equal share of the income from the mineral estate. 34 Stat. 544; see *United States* v. *Mason*, 412 U.S. 391, 393 (1973).

By regulation, a headright entitles the holder to one vote in elections for the Tribal Council. 25 C.F.R. 73.1 *et seq.* The headrights have passed by inheritance, however; thus some members of the Tribe have fractional headrights and others have multiple headrights (see H.R. Rep. No. 92-963, 92d Cong., 2d Sess. 9 (1972)). As a result, fractional or multiple votes are cast in Tribal Council elections. 25 C.F.R. 73.21. Some persons who claim Osage ancestry have no headrights.

2. Petitioners are seven Osage Indians, each of whom owns at least one full headright. They brought this action, which was transferred to the United States District Court for the Northern District of Oklahoma,[1] against the Secretary of the Interior and the Commissioner of Indian Affairs. The Osage Tribal Council was subsequently joined as a defendant. Petitioners alleged that the Tribal Council had

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[1] Petitioners originally sued in the United States District Court for the District of Columbia, which transferred the case to the United States District Court for the Northern District of Oklahoma. That court ordered the Osage Tribal Council joined as a defendant (Pet. App. A-2).

authority to act only in certain specific areas, principally concerned with the management of the mineral estate, defined by the Osage Allotment Act (Pet. App. A-1 to A-4). They claimed that the Tribal Council had exceeded its authority by participating in federal housing, employment, and economic development programs. They further asserted that the federal respondents approved the Tribal Council's actions and cooperated in them, and recognized the Osage Tribal Council as a "general government and not as an entity limited to mineral estate management" (Complaint at 6). As a result, petitioners said, funds that were part of the mineral trust were expended unlawfully, with the federal respondents' approval (Pet. App. A-3 to A-4).

After the parties stipulated that no material facts were in dispute (Pet. App. A-4), the district court granted in part and denied in part petitioners' motion for summary judgment. It held that the Osage Tribal Council was not limited to exercising the specific powers identified by petitioners (Pet. App. A-39, A-42) but could function as a "general governing body" (Pet. App. A-39). It reached this conclusion partly on the basis of the language of the Osage Allotment Act (Pet. App. A-26, A-27). Principally, however, the district court reasoned that the Act merely continued in existence the Tribal Council which was established, and granted general governmental powers, by the Osage Constitution of 1881 (see Pet. App. A-12 to A-13, A-16 to A-18, A-27 to A-30, A-37 to A-39). The district court held that the enumeration of specific powers in the Osage Allotment Act was intended only to supplement the Council's general powers under the 1881 Constitution (Pet. App. A-28).

The district court agreed with petitioners, however, that the Council could spend trust funds only on "activities * * * []related to the management of the Osage mineral estate" (Pet. App. A-40) and on those other functions explicitly enumerated in the Osage Allotment Act and other statutes. "[T]he use of Osage trust funds for purposes not specifically authorized by Congress is clearly improper" (Pet. App. A-41).

Petitioners then filed with the district court a "Motion to Vacate Judgment," apparently under Fed. R. Civ. P. 59(e). In this motion, petitioners asserted that the district court's ruling raised questions about the constitutionality of the Osage Allotment Act; citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964), petitioners argued that if the Tribal Council exercised general government powers it could not constitutionally be elected by a system which excluded many who claimed to be Osage and weighted the votes of others according to their headrights. Petitioners' motion also contended that the district court's "revitaliz[ing] the 1881 Osage [C]onstitution[]" was a "surprise" and that the district court should maintain jurisdiction over the case while the Secretary of the Interior developed a plan to take account of this ruling (Motion to Vacate Judgment at 1). The district court denied the motion (Pet. App. A-43 to A-44), saying that "[t]he constitutionality of the Osage Allotment Act was never an issue before this Court, and to grant the relief requested by [petitioners] in their motion would be to expand the scope of this case far beyond that within which it has proceeded since its inception" (Pet. App. A-43).

3. Petitioners appealed from the denial of the motion. The court of appeals affirmed what it described

as the district court's holding that "the funds derived from the mineral estate" could be used "only for the benefit of the owners of headrights and not for the benefit of the Tribe generally or for non-owners of headrights" (Pet. App. A-47, A-53).

The court also held that the Osage Allotment Act gave the Tribal Council "the authority to cause the Tribe to participate in the various programs challenged in this action" (Pet. App. A-53). In reaching this conclusion the court of appeals said that it was not relying on the 1881 Constitution; it ruled that "[t]he validity of the 1881 Constitution, whether any elements remain, or whatever its status, thus stand as issues not adjudicated in this action" (Pet. App. A-52). Instead, the court of appeals relied on the terms of the statutes. It noted that the Osage Allotment Act "in no way limited the authority of the officers * * * in mineral administration or any other specific function" and pointed out that the titles used in the Act for tribal officials and governing bodies suggested that they were comparable to other general tribal governments (Pet. App. A-49). The court also noted that an amendment to the Osage Allotment Act enacted in 1929 referred to the Council as the "tribal government" (Pet. App. A-49 to A-50).

The court of appeals also held that the district court acted properly in refusing to consider the constitutional issue raised in petitioner's motion because that issue was not raised by the pleadings and not addressed by the parties (Pet. App. A-47 to A-48). In addition, the court said, since petitioners were headright owners, they could not claim that their voting rights were infringed (Pet. App. A-51).

ARGUMENT

1. Petitioners contend that the courts below erred in construing the Osage Allotment Act and related legislation to grant "general governmental powers" (Pet. 22) to the Tribal Council. But petitioners have not explained how this aspect of the decisions below injures them. Petitioners' complaint may fairly be read to allege that the Council spends, with the federal respondents' permission, money from the mineral trust that should be paid to the benefit of petitioners as headright holders. But both courts below held that such expenditures are improper, and the federal respondents do not seek review of this holding. Petitioners do not identify, in the complaint or in the petition, any other way in which the Council's exercise of "general governmental powers" injures them, and none is apparent.

2. Moreover, petitioners have not shown that the court of appeals' interpretation of the Osage Allotment Act is incorrect. Petitioners' sole argument is that the courts below should not have construed the Act as a grant of general governmental power because this construction raises serious constitutional questions.[2] But the general rule is that a tribal gov-

[2] There are suggestions in the petition (Pet. 10-13, 26 & n.27) that petitioners intend to challenge the court of appeals' interpretation on other grounds. But the petition presents no question fairly suggesting any contention other than that the court of appeals' interpretation is incorrect because it raises constitutional problems. See Pet. i. Moreover, petitioners appealed not from the district court's judgment but from its order denying their Rule 59 motion. See Pet. 17; Brief for the Appellants at 2. The only issues presented in that motion pertained to the federal constitutional ques-

ernment, in its dealings with members of the tribe, is not prohibited from taking actions that would violate the Constitution if done by a state or the federal government. See *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 & n.7 (1978) (citing cases). Thus, the Osage Tribal Council might exercise general govern-

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tions raised by the district court's decision and the district court's reliance on the Osage Constitution of 1881. The latter issue is plainly not before this Court.

Petitioners' argument that the lower courts' interpretation of the Osage Allotment Act raises serious constitutional problems is distinct from a straightforward assertion that the Act is unconstitutional, an assertion that is made in petitioners' postjudgment motion. But as the district court (Pet. App. A-43) and the court of appeals (Pet. App. A-48) correctly noted, the complaint makes no attack on the constitutionality of the voting scheme. Moreover, petitioners probably do not have standing to make such an attack. Petitioners assert (Pet. 24) that at least one of their number has only one headright, and therefore his vote is counted less than that of Osage who hold more than one headright. But petitioners acknowledge (Pet. 25) that many Osage have fractional shares or no shares; each petitioner has at least one share (Pet. 14). Petitioners appear to contend that if the Tribal Council exercises general governmental powers, each Osage must be allowed an equal vote. See Pet. 22-25. It seems likely, then, that if petitioners' constitutional attack succeeded, each of them would receive less, not more, of a voice in the election of the Tribal Council. Thus petitioners have failed to show that they are injured by the constitutional defect (see *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)) or that the "exercise of the Court's remedial powers would redress the claimed injuries" (*Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); see *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973)). At the very least, these issues of standing should have been litigated below; they were not because petitioners did not properly raise their constitutional claim.

mental powers even though it is elected by a system of weighted voting that could not, under the Equal Protection Clause of the Fourteenth Amendment and *Reynolds* v. *Sims*, *supra*, elect a state or local unit of general government. Congress might, therefore, authorize the Council to exercise general governmental powers without violating the Constitution.

In any event, petitioners' complaint did not challenge "a system of general government" (Pet. 19) or the exercise of "general governmental powers" (Pet. 22). It alleged (Complaint at 5) that the Tribal Council "has purported to exercise governmental authority on behalf of all Osage Indians pertaining to the following matters" and then listed seven specific areas, generally concerned with participation in various federal programs.[3] Accordingly, the issue before

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[3] The areas were (Complaint at 5-6):

(a) Receipt, administration, and expenditure of revenue sharing funds pursuant to 31 U.S.C. § 1221, *et seq.* * * *;

(b) Receipt, use, allocation and disposition of benefits of the Special Employment Assistance Program, 42 U.S.C. § 4871, *et seq.*;

(c) Fostering and encouraging tribal industrial development;

(d) Operation of Economic Development projects pursuant to 42 U.S.C. § 3161(a)(3);

(e) Acting as prime sponsor and receiving and expending funds under 42 U.S.C. §§ 2738(b), 2739, 2740;

(f) Consultation with the Department of the Interior and Bureau of Indian Affairs regarding the distribution and expenditure of $1,000,000 of education and socioeconomic funds set aside for the entire Osage Tribe of Indians of Oklahoma by the Act of October 27, 1972, Public Law 92-586, 86 Stat. 1295;

(g) Establishment of an Indian Housing Authority to qualify to receive monies from the Department of Housing and Development for the construction and maintenance of housing.

the lower courts was whether the Tribal Council had authority to participate in these programs. See Pet. App. A-53. Even assuming the doctrine of *Reynolds* v. *Sims* applies to Indian governments, only a very limited question is presented: whether the Council's exercise of the power to participate in federal programs has a "disproportionate relationship * * * to the specific class of people" who hold more heavily weighted votes. See *Ball* v. *James*, No. 79-1740 (Apr. 29, 1981), slip op. 15. The effects of such participation on various classes of Osage Indians were unexplored below, presumably because petitioners did not show how it has any effect on them at all (see page 6, *supra*). Plainly, the issue is not appropriate for decision on the present record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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